

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Sections 309(j) and 337 of the	)	
Communications Act of 1934 as Amended	)	
	)	
Promotion of Spectrum Efficient Technologies	)	CC Docket No. 99-87
on Certain Part 90 Frequencies	)	
	)	
Establishment of Public Service Radio Pool in the	)	
Private Mobile Frequencies Below 800 MHz	)	
	)	

**Comments of the Office of Advocacy, U.S. Small Business  
Administration on the Notice of Proposed Rulemaking and the Initial  
Regulatory Flexibility Analysis of the Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) respectfully submits these Comments to the *Notice of Proposed Rulemaking* (“NPRM”)<sup>1</sup> in the above-captioned proceeding, which would determine whether the Federal Communications Commission (“Commission”) should begin applying mutual exclusivity to applications filed in the Private Land Mobile Radio services (“PLMRS”) or public safety radio services, in order to exercise congressionally-granted auction authority.

The NPRM does not consider the effects of the proposed rules on small business, which may be seriously impacted by a decision to license private internal communications licenses by competitive bidding, nor does it discuss alternatives designed to minimize this impact. For these reasons, the NPRM and regulatory flexibility analysis do not satisfy the requirements of the Regulatory Flexibility Act of 1980,<sup>2</sup> as amended by the Small Business Regulatory Enforcement

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<sup>1</sup> *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Notice of Proposed Rulemaking*, WT Docket No. 99-87, FCC 99-52 (rel. March 25, 1999).

<sup>2</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act<sup>3</sup> (collectively “RFA”). Therefore, the Commission should not apply mutual exclusivity to PLMRS or public safety radio services and should not subject licensees or prospective licensees in these services to competitive bidding. Instead, the Commission should issue a second notice of proposed rulemaking, including a revised regulatory flexibility analysis. The second notice should consider the impact of the Commission’s proposed licensing and auction rules on small PLMRS and public safety radio licensees, and should discuss alternatives that would limit the impact of these proposed rules on small business.

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305<sup>4</sup> to represent the views and interests of small business within the Federal government. Its statutory duties include serving as a focal point for concerns regarding the government’s policies as they affect small business, developing proposals for changes in Federal agencies’ policies, and communicating these proposals to the agencies.<sup>5</sup> Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.

**1. The NPRM Does Not Consider the Proposal’s Impact on Small Business.**

**a. The Commission offers no rationale for subjecting PLMRS to mutual exclusivity and geographically-based competitive bidding.**

Advocacy agrees that Section 309(j)(1) of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997<sup>6</sup> (the “Act”), requires the Commission to use competitive bidding to grant mutually exclusive applications for initial licenses or permits for services that are not statutorily exempt from this provision of the Act. But Advocacy also is of the opinion

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<sup>3</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

<sup>4</sup> Codified as amended at 15 U.S.C. §§ 634 a-g, 637.

<sup>5</sup> 15 U.S.C. § 634c(1)-(4).

<sup>6</sup> Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

that the Commission must avoid mutual exclusivity when it serves the public interest. And in this case, the Commission offers no reason why it would serve the public interest to license PLMRS or public safety radio services through the acceptance of mutually exclusive applications.

The Commission points out that the licensing of internal private communications has not generally resulted in the filing of mutually exclusive applications because licensees in these services share spectrum effectively, tolerate some interference, and are licensed on a first-come, first-served basis, subject to frequency coordination.<sup>7</sup> The Commission has identified no significant problems with this system that would support exclusive licensing, rather than shared use, and the Commission has given no indication why it would serve the public interest to change the method of licensing PLMRS.

The Commission also offers little justification for instituting a geographically-based auctioning process for PLMRS or public safety radio services. In fact, the Commission states that “[h]istorically, site-based licensing has met the needs of PLMRS users like railroads or petroleum pipelines [and m]any other PLMRS users . . . also have unique configuration requirements.”<sup>8</sup> The Commission does not suggest that these needs have changed, nor that the public interest dictates a different licensing scenario for PLMRS, nor that Section 309(j) of the Act requires that PLMRS be subject to mutual exclusivity.

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<sup>7</sup> See *NPRM*, page 11, paragraph 13-14.

<sup>8</sup> See *NPRM*, page 11, paragraph 13.

**b. The Commission admits its proposed rules may potentially impact small business but does not consider this impact.**

The Commission concedes that its proposed rules “could potentially impact every small business in the United States” because any of the estimated 1,087,267 U.S. small businesses (a 1994 figure) are eligible to hold PLMRS licenses.<sup>9</sup> But beyond this blanket declaration, the Commission performs no analysis of these possible effects. And these effects may be dire.

For example, if the Commission adopts rules awarding PLMRS licenses to the highest bidder, small businesses may be less able to compete with larger companies, which may have greater financial resources to pour into an auction. A larger company also might perceive a greater need than a small business might to hold a PLMRS license over a wide geographic area. (A smaller business may only require a license to cover internal communications within one office building or for a limited delivery route.) Thus, larger businesses may tend to receive wide-area license awards, as “Band Managers”, which would permit them to dole out unused portions of their licenses for use by other companies. This would require small businesses within an area of license to deal with a potential competitor, instead of the Commission, to establish new PLMRS systems or to modify existing systems.

These ideas raise questions, but do not provide answers, regarding the potential impact of this rulemaking on small business. Yet the Commission does not discuss or request comment regarding this impact, nor propose any alternatives to its competitive bidding scheme that may take the needs of small business into account. In fact, the Commission gives no indication that it has considered small business in proposing to auction PLMRS, nor that it will consider small business in issuing final rules.

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<sup>9</sup> See *NPRM*, Appendix A, page 52, paragraph 13.

**2. The IRFA Does Not Discuss Alternatives Designed to Minimize the Regulatory Burden on Small Entities.**

The Commission's Initial Regulatory Flexibility Analysis ("IRFA") does not discuss alternatives to the proposal to auction spectrum for PLMRS and public safety radio services. The Commission invites comment on "all proposals and alternatives described in the *Notice*, and the impact that such proposals and alternatives might have on small entities."<sup>10</sup> But the Commission does not describe these proposals and alternatives in the IRFA, as required by law.<sup>11</sup> In fact, while the Commission implies that it discusses alternatives in the main body of its *Notice*, this is not true. No discussion appears, anywhere in the NPRM or IRFA, of "significant alternatives to the proposed rule . . . which minimize any significant economic impact of the proposed rule", as is required by the RFA.<sup>12</sup> At the very least, the Commission must consider four alternatives laid out by Congress: (1) differing compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption – either in whole or in part – for small entities.<sup>13</sup> An analysis of the compliance burdens and alternatives that would minimize impact and still achieve the Commission's goals is an important part of a regulatory flexibility review, and the Commission needs to pay careful attention to these parts of the IRFA.

**Conclusion**

The Commission says that it effectively licenses PLMRS on a site-specific, shared basis, without mutual exclusivity. But now it considers changing this arrangement without identifying any rationale for doing so. Certainly the Act does not require the Commission to revisit whether

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<sup>10</sup> See *NPRM*, Appendix A, page 55, paragraph 25.

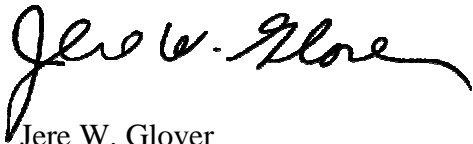
<sup>11</sup> See 5 U.S.C. § 603(c).

<sup>12</sup> 5 U.S.C. § 603(c).

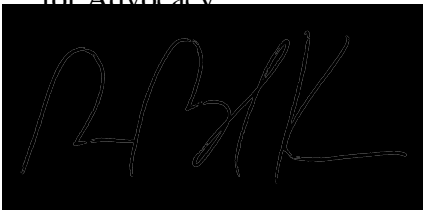
<sup>13</sup> 5 U.S.C. § 603(c)(1-4).

to apply mutual exclusivity to a particular service. The Commission does not discuss the impact of the proposed rules on small business, even though it asserts that potentially all small businesses would be affected, and the Commission does not identify alternatives that might minimize these burdens. For these reasons, the Commission should issue a second notice of proposed rulemaking, with a revised IRFA, to consider the effect on small business of introducing mutual exclusivity and competitive bidding to the licensing of PLMRS and public safety radio services.

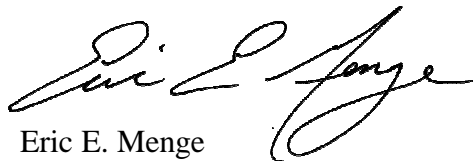
Respectfully submitted,



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